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No. 89-1659

In The

Supreme Court of the United States

October Term, 1989

William H. Schneider, et al.,
Petitioners,

vs.

Apple Computer, Inc., et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review a fact specific ruling that in large part affirmed summary judgment against petitioners' claims under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 on the alternative grounds that under the standards established by this Court's three 1986 summary judgment decisions (*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)):

(1) petitioners failed to meet their burden to present evidence sufficient to support a jury verdict in their favor that respondents' alleged omissions were material – i.e., that they would have significantly altered the total mix of information available to the marketplace (*Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)); and

(2) petitioners failed to meet their burden to present evidence sufficient to support a jury verdict in their favor that respondents acted with scienter (*Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976))?

PARTIES

Plaintiffs and appellants before the United States Court of Appeals are the petitioners herein: William H. Schneider, Charles and Jean Cohn, Albert J. Whelan, Jr. and Estelle B. Ellis, on behalf of themselves and a class of all persons other than defendants who purchased Apple Computer, Inc. stock during the class period from November 12, 1982 through September 23, 1983. Defendants and appellees before the Ninth Circuit are the respondents herein: Apple Computer, Inc. and several of its officers and directors – Gene P. Carter, John D. Couch, Wilfrid J. Houde, Steven P. Jobs, A.C. Markkula, Jr., Michael Muller, John Sculley, John Vennard, Delbert W. Yocam and Kenneth R. Zerbe. By order dated July 31, 1987, the District Court dismissed "outside" directors Peter O. Crisp, Arthur Rock, Phillip S. Schlein and Henry E. Singleton from this action. Because no appeal was taken from that order, these individuals were not parties before the Ninth Circuit, and are not respondents here.

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STATEMENT OF THE CASE

Petitioners' Section 10(b) and Rule 10b-5 claim is brought under a fraud on the market theory. Petitioners allege that respondents intentionally or recklessly made 16 falsely optimistic statements regarding the prospects of a revolutionary computer called Lisa, the forerunner to Apple's spectacularly successful Macintosh. App. at 1a.*

*The Petition for Certiorari is cited as "Pet. at ___." Appendices to the Petition are cited as "App. at ___." Petitioners' Excerpt of Record before the Court of Appeals is cited as "E.R. ___"; respondents' Supplemental Excerpt of Record is cited as "S.E.R. [volume] : [page]". Appendices to this Brief in Opposition are cited as "R. App. at ___." Because respondents agree with the sections of the Petition on the opinions below, jurisdiction and the relevant statutes and regulations, statements on these matters are not included herein. *See* Supreme Court Rules 14.1, 15.2, 24.2.

The challenged statements are for the most part generalized statements of optimism by Apple's officers and employees for the new Lisa computer.[1]

Petitioners' case is not about affirmative "lies." There is no claim that Apple was not genuinely optimistic about Lisa. Rather, Apple's optimism was said to be misleading because Apple allegedly failed to disclose relevant market risks.

In its present posture, the case presents an application of settled law regarding summary judgment procedure to a specific factual record, and nothing more. The legal principles applied below are clear, are based on recent rulings by this Court, are not in conflict with decisions of any other Circuit, and are quite unremarkable. The Ninth Circuit simply ruled that under this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), petitioners failed to carry their burden to support a jury verdict in their favor on two essential elements of their claim: (1) materiality, *see Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) and *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); and (2) scienter, *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). These rulings are intensely fact specific.

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[1] The Ninth Circuit affirmed summary judgment on 14 of the 16 challenged statements. App. at 10a-12a, 14a, 18a. Petitioners' claims on Statements 4 and 5 (App. at 2f), relating to the "Twiggy" disc drive, were remanded for further proceedings. A significant part of the evidence petitioners cite relates to the Twiggy disc drive, and is *not* relevant to the summary judgment affirmed by the Ninth Circuit and the subject of the Petition.

On materiality, the Ninth Circuit and District Court reviewed the record presented by respondents showing that the market was fully and credibly aware of all the relevant marketing risks. This awareness came from detailed and exhaustive public analysis of Lisa and Apple by industry and market experts. The market scrutiny was made possible because Apple made Lisa and its strategy publicly available. The courts below also reviewed the evidence presented by petitioners. Then, applying settled summary judgment rules regarding burden of proof and the evidentiary value of expert testimony, they ruled that petitioners had failed to present evidence sufficient to sustain a jury verdict that any additional disclosures by Apple of the marketing risks would have "significantly altered the 'total mix' of information made available," and been material. *Basic*, 485 U.S. at 231-32; *TSC*, 426 U.S. at 449. App. at 8a-14a.

On scienter, the Ninth Circuit also reviewed a voluminous record presented by respondents. That record was that respondents said what they said in complete good faith, with an honest and genuine belief that Lisa would succeed and with no intent to mislead. Beyond unrebutted declarations from each individual respondent, the record included many contemporaneous objective indicators of respondents' good faith, such as commitment of corporate funds to the development, manufacturing and marketing of Lisa, internal projections about Lisa sales, order backlogs, plans for follow-on products and so forth. The Ninth Circuit also considered what petitioners offered, and again concluded that petitioners had failed to present evidence sufficient to sustain a jury verdict –

this time on scienter. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). App. at 14a-17a.

This case does not present new or important issues regarding the fraud on the market theory in securities law cases approved by this Court in *Basic*. The Ninth Circuit applied settled law on materiality and scienter in a manner fully consistent with decisions of this Court and other Circuits. What this case *does* involve is whether, on its record, summary judgment was proper. Certiorari on this issue is inappropriate.

Petitioners devote significant time to arguments that the Ninth Circuit misinterpreted what this Court recently said in *Basic* on the fraud on the market theory. As we discuss, they are wrong. Furthermore, the Ninth Circuit's decision is one of the first applying what was said in *Basic*. The lower courts should be given more time to implement *Basic* before this Court examines the fraud on the market theory again. If it turns out that *Basic* is being misinterpreted, or interpreted in conflicting fashions, this Court may then revisit the issue.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied.

1. The Ninth Circuit's decision does not create a conflict among the Circuits. Supreme Court Rule 10.1(a). The only conflict alleged is on the materiality issue. *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir.), *cert. denied*, 484 U.S. 853 (1987), cited as in conflict, in fact supports the ruling here. The Ninth Circuit's opinion has been cited with approval by the First and Seventh Circuits. *Backman v. Polaroid Corp.*, 893 F.2d 1405, 1421 (1st Cir.

1990), *reh'g en banc granted* (Feb. 28, 1990); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989).

2. The decision does not depart from the accepted and usual course of judicial proceedings. Supreme Court Rule 10.1(a). It applies traditional summary judgment analysis and settled law on materiality and scienter to a voluminous and detailed factual record to reach a result narrowly drawn and limited to the unique facts of this case.

3. The decision does not conflict with decisions of this Court, or involve an important question of federal law not decided by this Court. Supreme Court Rule 10.1(c).

(a) This Court has recently spoken on summary judgment law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The decision follows this precedent.

(b) This Court has recently spoken on materiality and the fraud on the market theory in securities cases. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). The decision follows this precedent. Surely it is too soon for this Court to revisit what it said in *Basic* regarding fraud on the market theory. If, when the lower courts have had the opportunity to apply *Basic* to varied factual settings, it turns out they are misapprehending what this Court intended, or that they are in conflict, that will be the time for this Court to revisit the theory.

(c) This Court has made clear that scienter is an essential element of Section 10(b) and Rule 10b-5 claims. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The decision follows this precedent. Petitioners have no quarrel

with this legal principle. Their only claim is that, on the record here, summary judgment on scienter was inappropriate.

4. The decision is narrowly drawn and fact specific. Nothing justifies this Court duplicating the District Court's and Ninth Circuit's review of the voluminous record to determine the propriety of summary judgment on the unique facts.

5. This case is not here on final judgment. It has been remanded for proceedings on two alleged misstatements. App. at 20a. Whether issues ultimately remain that are worthy of review may be assessed, if need be, following final judgment.

ARGUMENT

Petitioners lead by arguing that certiorari is warranted because the Ninth Circuit ostensibly misread this Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), on materiality and fraud on the market theory to fashion precedent of ostensibly staggering implication at odds with a decision by the Seventh Circuit. In fact, the Ninth Circuit's decision follows settled precedent and is narrowly drawn to fit the facts of this case. Certiorari is not warranted on this issue.

Petitioners' real complaint – evident because they inundate this Court with factual arguments that quote the record out of context – is that summary judgment was inappropriate on materiality and scienter. Applying this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Ninth Circuit reviewed the record and

concluded otherwise. On both materiality and scienter – each an issue essential to their claim[2] – petitioners failed to carry their burden of presenting evidence sufficient to sustain a jury verdict in their favor. Certiorari is not warranted on these fact specific issues.

A. Certiorari Is Not Appropriate To Review The Summary Judgment On Materiality.

The Ninth Circuit applied settled law on materiality, in a manner fully consistent with applicable precedent. Omitted facts are not material where their disclosure would not have "significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A fraud on the market case, like this one, proceeds on the premise that the securities market (not any individual investor) is the relevant audience, and efficiently processes available information. *Basic*, 485 U.S. at 246-47 & n.24. The theory gives petitioners substantial benefits: they are relieved from showing that any investor even knew of Apple's statements, much less reasonably relied on them. But petitioners must also accept what comes with these benefits: in assessing materiality, what is relevant is what the market (not any individual investor) knows. *See Basic*, 485 U.S. at 231-32 (adopting *TSC* materiality standard for fraud on the market cases); *cf. id.* at

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[2] *See Celotex*, 477 U.S. at 323 ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"); *id.* at 323 ("moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

248-49 (fraud on the market theory fails where information "credibly enter[s] the market and dissipate[s] the effect of the misstatements").[3]

This does not, as petitioners say, create a "double" materiality standard. In both face-to-face cases and fraud on the market cases, the central inquiry is the same – whether disclosure of the omitted facts would have "significantly altered the 'total mix' of information made available." *TSC*, 426 U.S. at 449; *see Basic*, 485 U.S. at 231-32. The difference (compelled by the fraud on the market theory) is the relevant audience to whom the " 'total mix' of information [is] made available": in face-to-face cases, the individual investor; in fraud on the market cases, the market itself.

Nor does the Ninth Circuit's decision fashion a new, far-reaching precedent "excusing" "lies" by corporate insiders. This case does not involve lies. It involves statements of generalized optimism that were true because

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[3] Petitioners chastise the Ninth Circuit for reaching a judgment regarding what the market knew, saying this requires economic expertise. Petitioners must abide by *Basic*, which upheld the fraud on the market theory's central premise "that the market price of shares traded on well-developed markets reflects all publicly available information . . . ." *Basic*, 485 U.S. at 246; *see In re LTV Sec. Litig.*, 88 F.R.D. 134, 143-44 (N.D. Tex. 1980), *quoted and cited with approval in Basic*, 485 U.S. at 244, 246 n.24. Respondents presented voluminous evidence of the information in the marketplace. Petitioners presented only an incompetent "expert" declaration. On this record, the lower courts ruled correctly that petitioners failed to meet their burden. Petitioners could have chosen to present competent economic evidence. They did not do so.

honestly believed and rationally based.[4] Moreover, the ruling is narrow and fact specific: in a fraud on the market case, involving allegations that generalized statements of corporate optimism are misleading because they omit to disclose information regarding market risks, the omissions are not material where – on an appropriately developed record – the market was contemporaneously aware of the risks as a result of detailed analysis from authoritative sources, made possible precisely because the corporation made the subject of its optimism available for public scrutiny.[5]

The Ninth Circuit's decision is fully consistent with *Basic* and *TSC*. It has been cited with approval by the First and Seventh Circuits. *Backman v. Polaroid Corp.*, 893 F.2d 1405, 1421 (1st Cir. 1990), *reh'g en banc granted* (Feb. 28, 1990); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509,

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[4] *See, e.g., Marx v. Computer Sciences Corp.*, 507 F.2d 485 (9th Cir. 1974).

[5] Petitioners argue that the Ninth Circuit's statements to the effect that "Apple's omissions were excused" (App. at 10a, 12a) present a new standard that somehow replaces the analysis mandated by *Basic* and *TSC*. To the contrary, the panel's use of the word "excused" cannot reasonably be read to mean anything other than that the omissions were rendered immaterial by the other information. That conclusion rests solidly on the theory of *Basic* and *TSC*.

516 (7th Cir. 1989).[6] It is consistent with lower court precedent.[7]

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[6] In *Backman*, a panel of the Third Circuit upheld a jury finding of securities law liability. The panel, while citing the Ninth Circuit's decision with approval, held that the record on the market's knowledge did not suffice to upset the jury's conclusion that defendant's failure to disclose specific facts was material. *See* 893 F.2d at 1420-22. Rehearing *en banc* has been granted at the behest of the defendants. *Backman* shows that the materiality issue is a fact specific one. Perhaps most illustrative is *A & J Deutscher Family Fund v. Bullard*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,121 (C.D. Cal. 1988), which rejected summary judgment on market knowledge grounds not because the theory was wrong, but rather because the facts were lacking. There, the information alleged to have filled in for defendants' omissions consisted primarily of two newspaper articles, a year before the omissions, talking in generalities about an industry of which defendants' business was a subpart. *Id.* at p. 91,275. The marked differences in the factual record – here, the market analysis was facilitated by Apple, was contemporaneous, authoritative, highly detailed, and related specifically to Lisa – illustrate that the Ninth Circuit's decision does not (as petitioners argue) set far-reaching precedent that somehow emasculates the federal securities laws.

[7] *Teamsters Local 282 Pens. Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985); *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143-44 (N.D. Tex. 1980), *quoted and cited with approval in Basic*, 485 U.S. at 244, 246 n.24; *Beissinger v. Rockwood Computer Corp.*, 529 F. Supp. 770, 781-82 (E.D. Pa. 1981). *In re Western Union Sec. Litig.*, 120 F.R.D. 629 (D.N.J. 1988), trumpeted by petitioners, deals with the fraud on the market presumption of reliance. It holds, on the rationale that "[i]t is unreasonable to charge *prospective stock purchasers* with access to every bit of information which could have some impact on their decision," that the presumption cannot be rebutted by showing that market information presented an accurate picture. *Id.* at 638 (emphasis added). The decision ignores the central premise of fraud on the market cases – that the "investor" is the market, not individuals – and is flatly inconsistent with *Basic*.

Petitioners cite only *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir.), *cert. denied*, 484 U.S. 853 (1987) as creating a conflict in the Circuits. *Flamm* supports the Ninth Circuit. Consistent with *TSC*, *Flamm* says that if an "investor knows a particular fact demonstrating a risk, the failure to disclose related or corroborating facts is not material because it does not significantly affect the mix of information on which the investor acts." 814 F.2d at 1173. That conclusion is the precise equivalent of the Ninth Circuit's application of *TSC* to this fraud on the market case.[8]

The summary judgment on materiality here is premised on review by the District Court and the Ninth Circuit of a voluminous and detailed evidentiary record. Petitioners offer no reason why this Court should grant certiorari to duplicate the fact specific inquiry.

This Court has recently spoken on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The teachings of this trilogy are clear.[9] They were properly

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[8] Judge Easterbrook's opinion in *Wielgos* so acknowledges, citing both *Flamm* and the Ninth Circuit's decision for the proposition that the "fraud on the market" theory carries with it the corollary "truth on the market" theory. *See Wielgos v. Commonwealth Edison Co.*, 892 F.2d at 516.

[9] To defeat summary judgment, petitioners had the burden of presenting evidence sufficient to support a jury verdict in their favor, *Anderson*, 477 U.S. at 249, on every essential element of their claim on which they carry the burden of proof. *Celotex*, 477 U.S. at 322-23. Petitioners' burden is measured by the same substantive burden they would face at trial. *Anderson*, 477 U.S. at 253-55. "If the evidence is merely colorable . . . or is

applied here. Petitioners' arguments to the contrary are both incorrect and not worthy of certiorari.

First, petitioners say that this Court decided in *Basic* that the issues of materiality and what the market credibly knows in fraud on the market cases are for trial. *Basic* does say this is ordinarily so. 485 U.S. at 249 n.29. Surely, however, this Court did not mean to write Rule 56 off the books in fraud on the market cases.[10] This is a case where, on the factual record, summary judgment on materiality was appropriate.[11]

Second, petitioners say that under *Basic*, there is a factual dispute precluding summary judgment whether

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not sufficiently probative . . . summary judgment may be granted." *Id.* at 249-50. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 574. "[I]f the factual context renders [a] . . . claim implausible – if the claim is one that simply makes no economic sense – [the non-moving party] . . . must come forward with more persuasive evidence to support [its] . . . claim than would otherwise be necessary." *Id.* at 587. The standard for summary judgment "mirrors the standard for a directed verdict . . . which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250; *id.* at 251-52; *Celotex*, 477 U.S. at 323.

[10] *See Celotex Corp. v. Catrett*, 477 U.S. at 327 ("Rule 56 must be construed with due regard . . . for the rights of persons opposing . . . claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").

[11] Summary judgment on materiality, while perhaps rare, is appropriate on a proper record. *Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 566 (9th Cir. 1985) (affirming summary judgment on materiality).

information entering the market "dissipated" the effects of Apple's optimism. But this case is different from *Basic* in that it does not involve misrepresentations, only expressions of genuine optimism about the future. The issue here is not whether additional disclosures "dissipated" the effect of false information, but rather whether additional information credibly entered the market apprising it of Lisa's risks. *See Basic*, 485 U.S. at 248-49. Here, the record shows that it did. Thus:

(1) Apple made Lisa and its strategy available for public scrutiny by industry experts and market analysts long before customer shipments began – indeed before Lisa was formally announced. *E.g.*, S.E.R. I:178-82; 213-29, 304-35; 336-59.

(2) As a result of Apple's openness Lisa was subject to intense analysis (not, as petitioners suggest, just to sporadic and isolated commentary) by industry and market experts (not, as petitioners suggest, by ill-informed journalists). *E.g.*, S.E.R. I:127-396.

(3) The analysis made available to the market in excruciating detail (not, as petitioners suggest, in generalities) all the information petitioners say Apple omitted to disclose. *E.g.*, S.E.R. I:141, 184, 191, 302 (third-party software); S.E.R. I:142, 176, 302 (price); S.E.R. I:139, 142, 169, 194, 237 (competition and corporate accounts); S.E.R. III:1410-11, 1414-15, 1419-20, 1423-24, 1470 (order backlog).

(4) The information appeared contemporaneously with, indeed often juxtaposed in the same articles directly against, Apple's optimistic statements. *E.g.*, R.App. at 1a-12a, 1b-6b.

(5) Apple did, in fact, disclose many of the risks in the very articles in which its optimistic statements appeared. *E.g.*, S.E.R. I:141; S.E.R. III:1171-72, 1174; *see also* S.E.R. III:1097.

This is dramatically illustrated by the *Business Week* and *Wall Street Journal* articles (E.R. 5:152; E.R. 7:411) in which Statements 6-9 (App. at 2f-3f) appeared. We reproduce the articles as appendices. *See* R. App. at 1a, 1b.[12]

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[12] Lest this Court have any concern whether the Ninth Circuit properly reviewed the record, we correct one of petitioners' distortions. Petitioners say the Ninth Circuit "excused" respondent Jobs' statements in the *Business Week* article that "I don't think we will have any problems selling all the Lisas we can build" (Statement 7) and "Lisa is going to be phenomenally successful in the first year out of the chute" (Statement 8) because the *Business Week* article says that "[o]ne indication of how uncertain Apple's prospects are is that expert estimates of how many Lisas the company will sell are all over the lot – from 2,000 to 30,000." *See* Pet. at 23. This is *not* what the Ninth Circuit said. *See* App. at 4a (citing this quote as just one example of what the market knew).

In fact, only Statement 7 appears in the *Business Week* article (Statement 8 is from the *Wall Street Journal* article), and in the following context:

> *One indication of how uncertain Apple's prospects are is that expert estimates of how many Lisas the company will sell this year are all over the lot – from 2,000 to 30,000. Apple will not disclose its own internal sales forecast,* although Jobs says, "I don't think we will have any trouble selling all the Lisas we can build." *However, Apple's president and chief executive, A.C. "Mike" Markkula, Jr., concedes: "It's going to take time to get the message of what Lisa's all about across."*

R. App. at 4a-5a (emphasis added). Can petitioners seriously contend that this is actionable securities fraud?

The *only* "evidence" petitioners offered to rebut respondents' detailed factual showing of market knowledge was the declaration of one "expert" on the ostensible effect of that knowledge. Petitioners' real complaint is that this testimony entitled them to go to a jury, but was wrongly disregarded. *See* Pet. at 3, 22, 23, 28 & nn. 23-25.

This Court should not expend its limited resources deciding whether, on summary judgment in a particular case, the declaration of an "expert" was properly rejected. Defective expert declarations do not defeat summary judgment.[13] Here, the "expert" declaration was clearly

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Moreover, the article is entitled "Apple Takes On Its Biggest Risk Yet," and observes, among other things, that "[i]f the computer industry were a circus, Apple . . . would be a high-wire act performing without a net" and that Apple "was in the riskiest phase yet of its brief history" and "going for broke" with Lisa, a product generating "many questions [from] industry analysts." R. App. at 1a. The article assesses: (1) Apple's strengths and weaknesses; (2) Apple's competition in the industry; (3) Apple's position as a company on the vanguard of a rapidly evolving industry; (4) Lisa's strengths and weaknesses; and (5) the positive and negative reactions to Lisa from potential customers. Much of the article is based on candid and sobering comments from Apple itself. *See* R. App. at 1a-12a.

[13] As Judge Easterbrook recently stated in rejecting "expert" testimony on summary judgment:

> [The expert] presented nothing but conclusions – no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected. Rule 56(e) of the Rules of Civil Procedure provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence. They shall "set forth facts" and by implication in the case of experts (who

incompetent and properly disregarded.[14] If petitioners had competent economic evidence to present, they should have offered it. They did not.

Third, petitioners say that summary judgment was inappropriate because they were not credited with an inference of materiality from the fact that Apple's stock price dropped dramatically on the last day of the class period, when petitioners say "the truth about Lisa was finally revealed by Apple." Pet. at 3. On summary judgment, courts properly refuse to draw unreasonable or

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> are not "fact witnesses") a process of reasoning beginning from a firm foundation. . . . An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989). *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 806-08 (9th Cir. 1988); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422-24 (5th Cir. 1987); *Evers v. General Motors Corp.*, 770 F.2d 984, 986-87 (11th Cir. 1985); *Pennsylvania Dental Ass'n v. Medical Service Ass'n*, 745 F.2d 248, 261-62 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Chesebrough-Pond's, Inc. v. Faberge, Inc.*, 666 F.2d 393, 397-98 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982); *United States v. Various Slot Machs. on Guam*, 658 F.2d 697, 699-701 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-74 (D.C. Cir. 1977).

[14] *First*, the Ninth Circuit was correct that deference to an "expert" opinion was not necessary on a factual record as clear as the one here that Lisa's risks were known. App. at 13a-14a.

Second, the "expert" declaration was incompetent on its face. The "expert" did not even consider: (a) the actual market information assessing Apple's generalized optimism (here the information was comprehensive and detailed); (b) who provided the information (here credible and authoritative analysts); or (c) the context in which the information appeared (here often juxtaposed directly against Apple's generalized optimism). *See* E.R. 13:946 at ¶ 16 (expert "informed by plaintiffs' counsel that defendants have cited expressions of opinion

implausible inferences from circumstantial evidence. *See Matsushita*, 475 U.S. at 587; *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988).

The problem with petitioners' argument is that this is not a case about the market reacting suddenly upon learning the "truth" about objective facts about which it was lied to earlier. Rather, it is a case about Apple and the market making predictive judgments about market reception of a new product before knowing what the actual results would be. That the securities market may have reacted negatively once the actual results were known and the predictive judgments proved wrong says nothing about whether, at the time of Apple's before-the-fact optimism, the market was aware of the relevant risks.

Fourth, the uniqueness of the factual record here disposes of petitioners' argument that if the Ninth Circuit is right, *Basic* would have come out the other way because in *Basic* the market was supposedly aware from "rumors" about the truth concerning the merger negotiations. *Basic*

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by third-parties that the market was aware of competition"). The "expert" did not conduct a study or present any analysis.

Third, the "expert's" bare conclusion that "public statements by an issuer are presumed to be based upon knowledge superior to that of outsiders and are viewed by analysts as authoritative" (E.R. 13:939-48) is implausible when applied to the undisputed facts of *this* case, which does not involve hard historical facts or specific revenue or earnings forecasts, *cf. Spielman v. General Host Corp.*, 538 F.2d 39, 41 (2d Cir. 1976), but rather generalized expressions of optimism about the future. Here, there is no dispute that the analysts subjected Apple's optimism to extraordinary (and critical) scrutiny. *See Matsushita*, 475 U.S. at 594 n.19 (expert's study properly rejected where "implausible").

involved lies or half-truths on matters about which there was, at the time the statements were made, an objective truth that only the corporation (and its prospective merger partner) knew. The record in *Basic* did *not* support a conclusion that the market was unquestionably contemporaneously aware that merger negotiations were in fact taking place. *See Basic*, 485 U.S. at 249 n.29. This case, by contrast, involves true and genuine statements of corporate optimism about the future, alleged to be misleading only because of supposed omissions to disclose market risks. Here, the record is clear that the market was contemporaneously aware of those risks.

Thus, the record in *Basic* was a far cry from the record here. Had petitioners offered any credible evidence to rebut Apple's showing of what the market knew and when and from whom it knew it – evidence showing that the risks Apple allegedly failed to disclose had not "credibly entered the market" (*Basic*, 485 U.S. at 248-49) – the result below might have been different. They did not. Regardless, the issue is not worthy of certiorari.

To summarize, on all material issues the factual record here is not in conflict. Excepting "expert" testimony properly disregarded (App. at 13a-14a), the Ninth Circuit credited petitioners' evidence and gave them the benefit of every legitimate inference. What petitioners offered was insufficient to sustain a jury verdict in their favor on materiality, an issue on which they have the burden of proof. The record specific issue of whether summary judgment on materiality was proper here does not warrant certiorari.

B. Certiorari Is Not Appropriate To Review The Summary Judgment On Scienter.

The Ninth Circuit also ruled that petitioners failed to offer evidence sufficient to sustain a jury verdict in their favor on scienter. App. at 14a-17a.

There is no dispute about the underlying legal standard. Petitioners agree that scienter is a necessary element of a Section 10(b) and Rule 10b-5 claim. Negligence does not suffice. Where defendants speak in good faith, there can be no liability. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). At a minimum, some degree of knowing, intentional or reckless conduct – something much more than negligent business judgment – is required.[15]

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[15] This Court has not decided whether anything less than intentional misconduct satisfies the scienter requirement. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Circuits have held that various forms of "reckless" misconduct suffice. Of the Circuits, the Ninth Circuit at times employs the most relaxed standard. *See, e.g., Keirnan v. Homeland, Inc.*, 611 F.2d 785, 788 (9th Cir. 1980). Other Circuits are virtually unanimous in holding that only extreme recklessness will satisfy the requirement. *See, e.g., Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977), *cert. denied*, 450 U.S. 1005 (1981); *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 515-17 (1st Cir. 1978); *Rolf v. Blyth, Eastman, Dillon & Co.*, 570 F.2d 38, 44-48 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *McLean v. Alexander*, 599 F.2d 1190, 1197 (3d Cir. 1979); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 961-62 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 965 (1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979); *Hackbart v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982). Here, petitioners could not overcome summary judgment on scienter even with the benefit of the Ninth Circuit's more relaxed standard.

Petitioners' only complaint is that on this factual record, summary judgment was improper. Again, the Ninth Circuit reviewed a voluminous record and properly applied this Court's summary judgment precedent. Again, petitioners offer no reason why this Court should re-examine the Ninth Circuit's fact specific inquiry.[16] Certiorari is not warranted on this issue.

Petitioners did not offer evidence sufficient to support a jury verdict in their favor on scienter. To the contrary, respondents' good faith is established by uncontradicted evidence.

(1) The individual respondents all testified that in expressing optimism for Lisa, they acted in good faith with an honest belief that Lisa would succeed. S.E.R. I:83-126.

(2) Apple's conduct backed up its expressed optimism by devoting millions of dollars and substantial manpower to Lisa's development, manufacture and marketing, accelerating Lisa's production schedule and expanding production capacity in anticipation of success. *E.g.*, S.E.R. II:424, 431, 442, 547-50, 564, 614, 650, 718-19, 733-34.

(3) Apple's internal sales forecasts (the company's basic planning tool, never made public) demonstrated Apple's belief that Lisa would succeed. *E.g.*, S.E.R. I:86-89; S.E.R. II:554, 573, 606, 854, 922-28.

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[16] Summary judgment on scienter, while perhaps rare, is appropriate on a proper record. *Mayer v. Oil Field Sys. Corp.*, 803 F.2d 749, 756 (2d Cir. 1986) (affirming summary judgment on scienter); *Bryson v. Royal Business Group*, 763 F.2d 491, 494 (1st Cir. 1985) (same); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220-21 (9th Cir. 1980) (same); *Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1339-40 (9th Cir. 1980) (same).

Nor is there any evidence that Apple failed to consider the relevant facts and risks, or closed its eyes to known facts. The evidence is undisputed that Apple's management: (1) fully and deliberately considered all the pros and cons after collecting a significant volume of information about the capabilities, competitiveness and likely market reception of Lisa; and (2) evaluated the information through a deliberative process that encouraged forthright discussion, consideration of contrary information and expression of dissenting views. *Cf. Keirnan v. Homeland, Inc.*, 611 F.2d at 788 ("recklessness" by deliberate failure to consider known or easily discernible facts).

With no direct evidence of bad faith, petitioners say they were entitled to go to the jury on scienter because not all information available to Apple pointed to Lisa's success. This is merely an argument that Apple's predictive judgments about Lisa were wrong. But whether Apple's optimism was right or wrong is irrelevant. Scienter requires a finding that statements were not made in "good faith." The standard cannot be met by evidence that honest beliefs were wrong or even negligent. *Hochfelder*, 425 U.S. at 206.

Petitioners also say that respondents' collective sales of 8% of their stock warranted an inference of scienter sufficient to raise a jury issue. The Ninth Circuit properly concluded that nothing about the timing or amount of the sales supported an inference – contrary to the overwhelming and uncontradicted direct evidence – that Apple's optimism was not honest and genuine. Petitioners cite no authority permitting an inference of scienter from

insider stock sales absent of abrupt and otherwise unexplainable trading on the eve of public disclosure of an event that would obviously have a significant impact on the stock price. Here, there is no pattern, and no evidence linking the sales (in time or volume) to Apple's statements.

In fact, respondents sold a greater number of shares during an equal time period preceding the class period than they did during the class period. S.E.R. II:904-05. And they sold over half as many shares in the 30 days immediately preceding as they did during the class period – a fact dramatically inconsistent with petitioners' theory that respondents conspired to inflate Apple's stock price by issuing misleading statements during the class period. *See* S.E.R. I:91, 97, 100, 103, 107, 110, 119, 122, 126; S.E.R. II:904-05. Moreover, there is unrebutted testimony from several respondents demonstrating that their sales were unrelated to events at Apple – explained by specific external events or part of a pre-existing pattern. *E.g.*, S.E.R. III:1196-97, 1199-200, 1200-01, 1205-06, 1265-67. No inference of scienter is permissible.[17]

The record specific issue of whether summary judgment on scienter was proper here does not warrant certiorari.

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[17] *See Freeman v. Decio*, 584 F.2d 186, 197 n.44 (7th Cir. 1978).

CONCLUSION

There is no reason for this Court to re-examine the Ninth Circuit's fact specific determinations that, on the record here, summary judgment on materiality and scienter was appropriate. Certiorari should be denied.

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Respectfully submitted,

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RESPONDENTS' APPENDIX A

January 31, 1983 *Business Week* Article

(T.R. 5:152)

Apple takes on its biggest test yet

If the computer industry were a circus, Apple Computer Inc. would be a high-wire acrobat performing without a net. Against the odds, the personal computer pioneer founded in 1977 by Steven P. Jobs and Stephen G. Wozniak – then a couple of quasi hippies in their early 20s – has so far been a brilliant success. But voracious competition, particularly from International Business Machines Corp., has taken ever larger bites out of Apple's market share.

Now, in the riskiest phase yet of its brief history, Apple is going for broke to recapture its early lead. Amid much fanfare, the Cupertino (Calif.) company announced on Jan. 19 a new, $10,000 machine, called Lisa, that is designed primarily for computer-illiterate professionals, managers, and administrators in large corporations. "We're really banking everything on Lisa's revolutionary technology," acknowledges Chairman Jobs, now 27. "If Lisa fails," he quips, "we'll be just another half-billion- or billion-dollar computer company."

Apple's success to date has unquestionably been spectacular. From a two-person operation in Jobs's garage, it has grown into a multinational corporation with 3,391 employees. And in its latest fiscal year, ended Sept. 24, sales soared 74% to $583 million, while net income rose a striking 55% to $61 million. Nonetheless, IBM has

won a 19% share of the $1.3 billion U.S. market for personal computers priced at $1,000 to $5,000 since the company entered a mere year and a half ago. And it could take even more with an upgraded version of its Personal Computer, expected out next month, and later a less expensive model dubbed "Peanut." In just the last year, Apple's share of market sales has slipped from 29% to 24%, according to market researcher Dataquest Inc.

Mantle of leadership. To regain its balance, Apple is groping its way into a corporate market in which it has almost no direct experience. What is more, that market is already overcrowded with the giants of the U.S. computer and office-equipment industries, including IBM, Digital Equipment, and Xerox.

Perhaps even more important, with Lisa, Apple is also taking on the mantle of the personal computer industry's technology leader. "Frankly, technology leadership is Apple's only option," explains Fred M. Gibbons, president of Software Publishing Corp., a leading microcomputer software supplier. "It can't outmarket IBM, and unlike IBM, it can't get away with me-too technology." Lisa's novel computer-programming techniques make the machine so easy to use that novices can learn to run it in as little as half an hour. Typically, it takes more than 20 hours to learn to use today's Apple II personal computer – the most widely used machine in its class, with some 600,000 units sold. "Apple is really the only company that is significantly advancing personal computer technology today," says Gibbons.

This is a brand-new role for Apple. The company has largely been built on sales of its first computer, the Apple II, whose success is generally attributed less to technical

wizardry than to clever packaging, merchandising, and publicity. "The company did a great job defining a new computer market for 'personal' computers with the Apple II," notes Ralph A. Gilman, computer industry analyst at InfoCorp, a Cupertino-based market research firm.

'E. T.' is coming. Now, Apple is hoping the virtues of Lisa's computing-for-the-computer-naive technology will compensate for what the company lacks in marketing savvy in the unfamiliar corporate course it is charting. "With Lisa's technology, we have set the direction for the computer industry for the next 5 to 10 years," says a confident Jobs. Within five years, he claims, every computer sold by Apple will incorporate this technology. The first such Lisa spinoff, planned for introduction later this year, is a $2,000 machine called Macintosh, or Mac for short. And rumor has it that the next may be a product code-named "E. T." for the home market.

For Apple to succeed and recoup the $50 million it is estimated to have plowed into developing Lisa and Macintosh, however, it must over the next year answer the many questions industry observers have about its product and corporate strategies:

- Is there a large enough market for easy-to-use computers such as Lisa that have a $10,000 price tag? "Obviously there is some market," says Jon Shirley, vice-president of the Computer Div. at Tandy Corp., an Apple rival. "How large it is is pretty questionable."

- Does Apple have enough of a technological lead to ensure that imitators do not grab its market?

- Can Apple, relying partly on a tiny sales force and mainly on a network of independent computer dealers,

succeed in selling computers to large corporations accustomed to buying machines from what one dealer calls "well-oiled computer-company salesmen in pin-striped suits?"

• Can Apple get independent dealers and software writers to support Lisa?

• Does Apple's product strategy make sense? Many observers fear that Macintosh, the inexpensive application of Lisa's technology, will steal Lisa's thunder – and its market. They also worry that both of these products might damage the markets for the Apple II and III, on which Apple is counting for the bulk of its revenues until mid-1984. "This is Apple's first experience being a multiple-product-line company," says Portia J. Isaacson, president of Future Computing Inc., a Richardson (Tex.) market research firm.

• Finally, are Apple's youthful managers perceived to have grown up enough so that potential corporate customers feel they can do business with them? Recounts John D. Couch, 36, who spearheaded the Lisa project: "One large customer recently confessed that he came in here expecting to find a lot of 26-year-olds wandering around in Levi's with money falling out of their pockets."

One indication of how uncertain Apple's prospects are is that expert estimates of how many Lisas the company will sell this year are all over the lot – from 2,000 to 30,000. Apple will not disclose its own internal sales forecast, although Jobs says, "I don't think we will have any trouble selling all the Lisas we can build." However, Apple's president and chief executive, A. C. "Mike"

Markkula Jr., concedes: "It's going to take time to get the message of what Lisa's all about across."

Multiple tasks. InfoCorp's Gilman estimates that the easy-to-use computer that inspired Lisa's development – the two-year-old Xerox "Star" – has had total sales of only 2,400 units so far. But the Star has only some of Lisa's features and initially costs customers $50,000 or five times as much as Lisa, he points out. Nevertheless, "because Apple is changing its product and its customer base with Lisa, I would expect it to get off to a slow start," predicts E. David Crockett, a computer industry analyst at Data-quest Inc.

The size of the market is uncertain, because Lisa is so novel. Until now the user has had to sit at the computer keyboard and type in arcane and often hard-to-remember commands to make his computer work. Every time he wanted to change from one job to another, he had to change program disks. And information he typed into one program had to be typed in again if he needed to use it in another program.

With Lisa, though, the user has to touch the keyboard only to feed in data, not to get the machine to work. Using a hand-held device called a "mouse" that controls an arrow on the screen, the user simply points to the command he wants and activates it by pushing a button on the mouse. Lisa's special software also lets it do many jobs at once – such as calculating figures and then drawing a graph of the results.

Bet your company? "People use the word 'revolutionary' all the time, but this is the first thing I've seen that justifies the use of that word," says Kenneth T. Lim, a computer industry analyst at Dataquest. However, Lisa also has shortcomings. One complaint from experts is

that it is somewhat slow in retrieving information from its memory. "Yes, it is a bit slow today," concedes Couch, who now heads the Office Products Div. that Apple has built around Lisa "But we will be speeding it up over time."

Some industry experts are disturbed by the new technology's pivotal role in Apple's future. Cautions consultant Isaacson: "Although I think Lisa is a breakthrough product, I'm not sure Apple should be playing bet-your-company with it."

One danger is that the corporate customers expected to account for the bulk of Lisa's sales seem to be in no hurry to buy. Granted, Apple has been swamped with requests from companies to be chosen as Lisa test sites, and those that have been running such pilots have been enthusiastic. "I was impressed and really very excited," declares Dana "Rick" Richardson, national director of computer auditing and national director of microtechnology at Arthur Young & Co. The New York-based accounting firm intends to move quickly. "We plan to be aggressive with this new technology and to purchase some [Lisa] units."

No frenzy. But most potential corporate customers are being far more cautious. "I personally like Lisa," says Gerald L. Brody, chairman of the year-old personal work station task force at Standard Oil Co. of California, which has been running a pilot test. But, he notes, "there is no frenzy to go to personal computers in our company. We may decide that this generation of machines is not the one we want for everyone's desk." Adds Don D. Smith Jr., a consultant for Atlantic Richfield Co.'s Corporate Units' Information Services Group: "We already have

many big computers and terminals, and like most big companies, we are moving cautiously rather than springing ahead to invest in small computers."

Burgeoning competition may also contribute to a slow start for Lisa. Over the next few months, several software companies are expected to introduce programs that will provide various personal computers – including the IBM Personal Computer, Apple's archrival – with many of Lisa's easy-to-use features. "Whereas Lisa's software can only run on the Lisa machine, [our program] is going to run on scores of machines," says Daniel H. Fylstra, chairman of VisiCorp, which last December previewed VisiOn, a software package that offers some of Lisa's features.

Apple must also recruit independent software companies to write new software for Lisa. Their programs, which can be added to six other already built into Lisa, are vital because computer buyers generally choose machines that offer the largest variety of applications. The danger for Apple is that independents may decide they would be better off spending time developing software that can run on many machines instead of on Lisa alone.

Dealer discontent. Apple's unorthodox plan for selling, supporting, and servicing Lisa seems unlikely to encourage customers to rush out and buy, however. A 100-member sales force of Lisa "account executives" will be ready by April, when Apple starts shipping Lisas in volume. It will sell the machine to large companies and coordinate the management of an account on its various sites. "The sales agreement will be between Apple and the big company," explains Barry H. Smith, Lisa's product marketing manager.

But, explains Smith, "the different branches of the company will place their orders with their local Apple dealers." For service and support, the customer will be able to choose between the local dealer – who will be authorized to sell Lisa if he can meet certain requirements – or RCA Corp., with which Apple has entered into a service agreement.

The plan does not thrill large companies. "We don't want to have to go through dealers," says Standard Oil's Brody, echoing the sentiments of some other target customers. "Our experience has shown that we have more leverage and get better service when we deal directly with manufacturers."

Scary price point. Some dealers are equally unenthusiastic because they worry that the machines are too expensive for their typical customer. "I'm scared to death of a $10,000 price point for a product," says Warren Winger, chairman of CompuShop Inc., a Richardson-based chain of dealerships.

There are at least two reasons why Apple is eager to stay with its dealer network rather than create a direct sales force of its own, an option it does not rule out. For one, dealers account for almost all purchases of the company's bread-and-butter products – the Apple II and III – as well as the upgraded Apple IIe, also announced on Jan. 19. "Apple has to balance dealer loyalty – which it needs to sell its present product line – against its need to sell to large companies," explains InfoCorp's Gilman. Lisa marketing manager Smith offers the other reason: "While we see the 500 [largest industrial companies] as being the key market for Lisa, we may be most successful selling it to medium and small companies that our existing dealer base reaches very effectively."

However, a portion of this dealer base – particularly the full-service dealers who provide extensive support for Apple's products – is acutely unhappy with Apple right now. Last summer, Apple began to encourage heavy discounting to maintain its competitiveness with IBM and to sell old Apple IIs before the new model IIes arrived. As a result, the retail price of a typical Apple II with peripheral devices has dropped from $2,500 to $2,000, and dealers' margins are estimated to have been halved.

The Mac strategy. Apple hopes to keep dealers in line with the prospect of selling not only Lisa but, better still, Macintosh. With its target price of $2,000, Macintosh is more akin to the products the dealers have been handling. A seasoned industry analyst deeply impressed by a preview of Macintosh says, "The future of Apple is going to be Macintosh, not Lisa." Adds the ebullient Jobs: "When it comes out, Mac is going to be the most incredible computer in the world – another Apple II."

Apple executives are close-mouthed about Macintosh. However, sources close to the company say Macintosh, like the Apple II, is intended as a general-purpose machine for everybody: "It's for people who work at home, students, teachers, etc." Borrowing Lisa's features, Macintosh – unlike the Apple II – will be able to serve people who know nothing about computers, insiders say.

Apple's critics chide the company for poor strategic planning in announcing Macintosh and Lisa in the same year, thereby confusing customers and possibly spoiling the market for Lisa. Other critics are disturbed because Macintosh and Lisa are "incompatible," which in the industry's jargon means that the two will not run the

same computer programs. "It's a serious flaw in the strategy," says InfoCorp's Gilman. "Customers like to start with an inexpensive machine and then upgrade it with the more expensive version." Such compatibility is a cherished precept of the computer industry.

But Jobs counters: "You can't have a revolution when you are tied to the anchor of your own history." Macintosh is priced lower, he says, because hardware innovations make it less expensive. But while the machines are incompatible, anyone who can use one of them can also use the other. According to sources close to Apple, Macintosh is priced lower also because it will initially run only a few fixed programs, including word processing and financial modeling. Lisa, by contrast, with its six basic applications programs, can be infinitely expanded.

Power struggles. As Apple insiders tell it, the incompatibility of the two machines results not just from the demands of innovation but also from internecine rivalry that followed the company's split into product divisions in 1980. Although Apple will not officially confirm the details, sources say that Jobs wanted to run the Lisa division but that Michael M. Scott, Apple's president at the time, told him he lacked the necessary experience and gave the job to Couch. "Steve was furious and went off and started the Mac project," says an insider. "He was determined to prove that Mac could be a bigger success."

For Macintosh and Lisa to be compatible, Jobs would have had to let the Macintosh project fall under the Lisa division's control. Jobs won the power struggle: The Lisa division lost. He now concedes, "I am paying extra special attention to this one [Macintosh] myself."

Despite such maneuvers, however, there are some indications that "the management is becoming more seasoned," says Joan McKay, an analyst at Kidder, Peabody & Co. Earlier this month, Apple hired its first-ever vice-president for marketing, 45-year-old E. Floyd Kvamme, who has broad experience in the semiconductor, consumer electronics, and computer industries. Until then, marketing was one of Markkula's many responsibilities. Kvamme is expected to concentrate on tackling Apple's distribution problems and to rationalize the three product divisions' marketing strategies so they do not collide.

'Eccentric passion.' Fortunately for Apple, 40-year-old Markkula, who has indicated for about two years that he would like to retire as president – "if we can find a person we think can do a better job than me" – shows no signs of carrying out that plan. Dataquest's Crockett, expressing the view of many observers, says: "I would view it as a negative for the company if he were to leave. He has contributed balance to Apple." Markkula's pragmatic and wryly humorous approach is seen as an essential counterweight to Jobs's creative temperament and sometimes arrogant demeanor.

Yet Jobs's qualities, which engender a certain nervousness in the financial community, are to some degree mirrored in Apple's corporate culture and make the company attractive to bright young engineers and business school graduates. "Apple is seen as a dynamic and creative place to work, where you get a change to make a contribution," says product manager Kristen A. Olson, who joined Apple after she got her MBA in 1981.

Jobs himself characterizes the Apple corporate culture as one in which "we have what you might call an

eccentric passion for what we are doing." Enthusiasm of that order is certainly essential if Apple is to meet the enormous challenges it faces over the next two years. Its struggle will be closely watched by friends and foes alike. "Apple's is such a darling little story that I hope it succeeds," says Future Computing's Isaacson. "But there are also a lot of people out there waiting to give the company a good kick if it fails."

RESPONDENTS' APPENDIX B

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Some Warm Up To Apple's 'Lisa,' But Eventual Success Is Uncertain

By Erik Larson
Staff Reporter of The Wall Street Journal

CUPERTINO, Calif. – The people at Apple Computer Inc. express great confidence in the new Lisa computer, a $10,000 machine designed to meet the needs of managers and executives at the nation's largest companies.

"Lisa is going to be phenomenally successful in the first year out of the chute," says Steven P. Jobs, Apple's 28-year-old chairman. Adds John Couch, vice president and general manager of the personal office systems division that developed the machine: "This division is going to make Apple's growth before this look small."

But Lisa technology has yet to prove itself in the big-company market. The machine, whose integrated programs and hand-held controller make it very easy to use, won't be available to most customers until about June, Apple estimates. Nevertheless, many companies are testing Lisas. As a result, some are changing their minds about what the computer industry has to offer and how a new and novel machine ought to fit into corporate operations.

The machine's success is critical to Apple. The company has other products that sell well, including the Apple IIe. That machine corrected faults users found in the Apple II and became a big success soon after its introduction in January. The Lisa, however, represents a

$50 million investment in a new approach to microcomputers. And, says Mr. Jobs, "Lisa technology will be Apple's technology base for the '80s." In fact, the company is already developing a computer called the "Macintosh" that will use elements of Lisa technology but cost less and aim at a different market. The Lisa will also test how well Apple can compete against International Business Machines Corp. in the corporate market, where IBM has been such a success.

Increasing Estimates

Barry Smith, product marketing manager for the Lisa, says the company has increased by 50% its estimate of how many machines it should make by the end of the 1984 first half. (The company won't disclose actual sales projections.) Compugraphic Corp. of Wilmington, Mass., says it plans to order at least $20 million worth of Lisas. "What we're finding is the reception of Lisa has just been very strong," Mr. Smith says. "We find people willing to put down $10,000 without blinking an eye."

So far the only indications from the field of how well Lisa is doing come from companies testing the product and dealers taking orders. But in an industry powered by testimonials and me-too buying, the views of these people count a lot.

Charles C. Hoerner, manager of office systems at Foremost-McKesson Inc., San Francisco, has found that the Lisa raises an interesting dilemma." Before the company got its first Lisa to test, it had made a "de facto commitment" to the IBM personal computer and was just getting used to about 30 of them.

Nevertheless, Mr. Hoerner says, the Lisa is very "friendly," or easy to use. "We're finding the training is going four or five times more easily then we thought." Also, he says, the machine overcomes people's fear of computers. "Their eyes widen, they move in, see a five-minute demo, and walk away thinking, 'I can do that.' " But the Lisa is also a stranger. Currently, it can't exchange information directly with the IBM microcomputers. (Apple is working on products that will change that.) "To introduce another incompatible device, with incompatible hardware and training," injects an element of "conflict" into a company, he says. And he adds: "I was hoping I wouldn't have to face so difficult a decision so soon."

'Power' and 'Casual' Users

Dana Richardson, a partner and national director of microtechnology for Arthur Young & Co., which is set to test 10 Lisas, says Lisa probably won't benefit everyone at the company. Arthur Young divides its computer users into "power" users – those who use computers a lot and don't necessarily need machines that are very simple to use – and "casual" users – those for whom ease of use is a big requirement. The Lisa, he says, best suits the casual user, whereas machines sold by IBM and Hewlett-Packard Co., among others, would better serve the power users.

One important question is whether third-party software developers will write useful programs for Lisa, thereby further expanding the machine's usefulness. Software writers flocked to the Apple II and to the IBM personal computer, for example.

"If the Lisa catches on, everybody's going to be writing software," says Gerald Brody, staff research specialist at Standard Oil Co. of California in San Francisco. (He's had a Lisa purring by his desk since December.) "If it doesn't catch on, we're going to have a museum piece."

To encourage software writers, Apple held a conference recently in Monterey, Calif., attended by representatives of about 150 commercial software producers. It spent a day telling them how the Lisa system works. In addition, major software companies, such as Microsoft Corp., Digital Research and BPI, are working on programs for the machine. The "tool kit" being developed by Apple will eventually help them produce software for the "integrated" portion of Lisa, which lets a user switch easily from tasks done on one program to those done on another.

One company unlikely to write programs for the Lisa is VisiCorp., a San Jose, Calf., software developer now working to produce VisiON, which is widely considered to be the Lisa's closest competitor. Those who have seen a VisiON prototype in action say it uses a hand-held controller, or "mouse," just as Lisa does, and can make a computer do a lot of Lisa's maneuvers. VisiCorp. won't discuss how much VisiON will cost, but, says Kurt Lynn, product marketing manager, "the incremental cost to the user is going to be very small."

Price is a major issue. The Lisa costs $9,995. If VisiON proves to be a cheap, powerful software package, it will be tough competition. But some Lisa testers wonder how much additional hardware would have to be added to a personal computer, and at what cost, to support VisiON.

"The ideas are very, very similar," says Standard Oil's Mr. Brody. "I suppose the question is whether they can pull it off, and make it perform, and make it perform on existing machines."

In addition to price, the Lisa's novelty is likely to make buyers wary. Egil Jullussen, chairman of Future Computing Inc., a market research company, says it will be about a year before companies start deciding to make volume purchases. First, he says, they'll buy a couple of machines to see how they work. "The Fortune 1000 – they move kind of slow in these areas," he says.

Waiting for Others

The machine's novelty makes it difficult to evaluate. "It's kind of scary in that you're buying something almost sight unseen," says Tom Dorn, an analyst with Harvey Rose Accountancy Corp. in San Francisco, which does budget analysis for the city and other government entities. "I've gotten hints that everyone's afraid to jump in and is waiting for everyone else."

Apple's Mr. Smith says a lot of companies will buy just one or two machines in the beginning. But, he says, more companies are willing to commit themselves to larger orders than Apple had expected. "They're talking larger numbers for their first order, and a quicker reorder," he says.

More important than the $10,000 price, testers say, is how well that investment will be supported by Apple. Companies want to be assured Apple will be able to provide the maintenance and program advice that a company like IBM is so good at providing. "When you start

factoring in a lot of these other things, you find the initial cost of hardware is trivial compared to that – in fact, very trivial," says Foremost-McKesson's Mr. Hoerner.

To provide on-site maintenance, Apple has formed a joint venture with RCA Corp. It also plans a hotline to help companies better use Lisa software. It says the machine was built for easy maintenance, and it plans to teach some customers to maintain their Lisas themselves.

Dealers seem to believe the machine will be a success. Al Montross, owner of Compco Computer Centers, Dallas, says he increased by 30% his forecast of how many Lisas he could sell in the first 12 months after delivery. Another dealer says he raised his initial order to 100 Lisas from 10. Some, however, are more cautious. "It looks like it's going to be a winner," says John Vito, president, Computer Stores Northwest Inc., Corvallis, Ore. "I'm not sure, but it looks like it."